KEENER ON QUASI-CONTRACTS.[1] II.

THE correct definition of law in its usual sense, that is, the municipal law, which is the subject matter of jurisprudence, as distinguished on the one hand from morals, from the principles of mechanical action and reaction, and from general propositions, to all of which the term has been applied, but as including on the other equity, admiralty, and ecclesiastical law, or any juridical system administered in the community, is a matter of great dispute, and per-

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[1] Continued from 10 HARVARD LAW REVIEW, 227.

A word of explanation is perhaps demanded by the form of this article, which has confronted me with a larger task than I had at first comprehended. I realized from the beginning that mere iconoclasm is hardly enough, that to build is incalculably more useful than to tear down, and that if my task were to be adequately done, it must contain, besides the criticism, a positive contribution to theory. Accordingly, I planned a brief explanation (and it might have been very brief) of a theory of restitution; but in the actual writing it became necessary to formulate some common ground of accepted principles upon which the discussion could proceed. The learned author had advanced almost no proposition to which I could unqualifiedly agree, and I could think of none with which in fairness I could expect him to agree. The only recourse in this dilemma was to such propositions as were necessarily implied in the fact of argument about a common subject matter, and hence followed inevitably a consideration of the nature and reason of law and of the necessary postulates of jurisprudence. In order to bring the discussion within the limits of a magazine article, it has been condensed to the last degree of permissible compression. I can only hope that it is not unintelligible.

It is but just to acknowledge the sources of the theory herein set forth. Even as a student at school I was conscious that the doctrine of unjust enrichment needed to be supplemented by a definition of injustice, or rather of justice, a problem which I hoped some day to solve. While I was so building castles in the air, Professor Ames in class one day intimated that there might be a principle of restitution anterior to, and perhaps the basis of, unjust enrichment, and that suggestion has not been forgotten. It is, in fact, the beacon that I have followed. His bread once cast upon the waters now returns to him.

The conception of the organic constitution of society, and the conception that it is the basis of ethical obligation, have long been familiar to me from the teachings of my father, Dr. Francis E. Abbot. He has elaborated the former in a little volume entitled "The Way Out of Agnosticism" (Boston, Little, Brown, and Company, 1890), and the latter in an article entitled "The Advancement of Ethics," published in the "Monist" for January, 1895 (Chicago, The Open Court Publishing Company).

For the remainder of the theory, including the argument for the necessity of obligation as a part of the organic law in its application to persons, the classification of rights, and the discussion of special cases, I believe that I alone am responsible. Finally, it is to be added that illustrations and citations of authority have been sparingly made, not only because of limited space, but also because no proposition has been advanced as a proposition of the substantive law which seemed to require the support of authority.

haps no satisfactory definition has yet been given. Some essentials, however, may be readily determined without much discussion. For example, it will be agreed that law in this sense is a standard of conduct for human beings, and also that it is prescribed by the community through its constituted authorities. The agreement in definition would perhaps stop here ; [1] but a definition containing no more than that would lack at least one element that should properly be contained in it. If municipal law in the sense indicated is to be the subject matter of jurisprudence, which is a science comparable to, and with an assured position among, the other sciences,[2] it must be capable of scientific treatment, or, in other words, must be rational. It might conceivably exist and be irrational; but in that event there could certainly be no science of it, and therefore no jurisprudence. It follows that in every juridical discussion in which there is anything more than affirmation on one side and negation on the other, there is necessarily implied as one of its conditions the rational character of the law.

Law, to be rational, must be founded upon a reason. If no reason should in fact exist, law would have no support but the power of the legislating community. It might, it is true, exist under such conditions, but it is also true that it would then lack certain important characteristics usually associated with law. It would lack, for example, every characteristic of permanence and stability. It might change at any moment, according to the shifting will of the community which prescribes it, and still maintain whatever validity as law it originally possessed, for by hypothesis it would have no reason, and therefore would have no reason for being one thing

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[1] Compare the following definitions : —

Law is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 Bl. Comm. 44.

It is "a general rule of external human action enforced by a sovereign political authority." Holland, Juris. 37.

"It is the body of commands issued by the rulers of a political society to its members, which lawyers call by the name 'law.'" Markby, Elem. of Law, § 5.

"Every positive law, or every law simply and strictly so called, is set by a sovereign person, or sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." Austin, Juris., Lect. VI. sec. 189.

"Rules of [law] are the rules which are deemed binding on the members of the state as such, and are administered, as and because thus binding, by courts of justice." Pollock, First Book of Juris. 55.

Many more definitions might be cited; but these will suffice to show how great a variety of form may be combined with similarity of substance.

[2] See Bouv. Law Dict. *sub voc.*, and references.

rather than another. It might prescribe one standard of conduct to-day, and another to-morrow, and a third the day after. Being without a reason in fact, it would necessarily violate all reasons, and would literally be unreasonable. Unreasonableness, however, is irrationality; and municipal law, therefore, not being irrational, must be founded upon a reason. Any definition which neglects to indicate this is, so far at least, defective.

Every juridical inquiry which purports to be exhaustive and rationally sufficient must, in view of the foregoing considerations, be pressed back to the ultimate reasons of law. Of course, any such requirement may be urged beyond legitimate bounds. A demand for ultimate reasons continually pressed would not stop short of the foundations of the universe, and would include the most recondite investigations of philosophy. This, however, is obviously unnecessary in anything but philosophy, and therefore jurisprudence, like all other special sciences, may with propriety rest upon assumed postulates. All that can be rightfully demanded is that its postulates be clearly expressed as postulates, and that they do not illicitly contain a predetermination of its conclusions. These conditions being complied with, any investigation into the postulates themselves will lie outside of law, and will properly belong with that investigation which relates to the postulates of science generally, that is, philosophy.

One of the postulates of jurisprudence has been already indicated. Being a science, and law, as its subject matter, being therefore rational, its determinations must be ascertained by the process of reason and must endure the tests of logic. The validity of the syllogism in matters juridical, as the antecedent condition of any possible juridical argument, is thus the first postulate of jurisprudence.

Another involves the mooted question of the freedom of the will. A standard of human conduct, as distinguished from necessary laws like those of mechanics, implies the possibility, together of course with the impropriety, of disobedience, and therefore of necessity implies the ability of the human being to whom the rule is prescribed to choose in the alternative between obedience and disobedience. That ability to choose is freedom, and the possession of it under the prescription of law is juridical responsibility. Freedom in the individual as the antecedent condition of juridical responsibility is thus a second postulate of jurisprudence.

These two are in fact more than postulates ; they are the necessary conditions of the science. He who condescends to argue within the field of jurisprudence must perforce take them for his data. They may be questioned in their proper place, but within that field they cannot be questioned. If, when properly questioned, they shall be ultimately sustained as valid, the possibility and actuality of jurisprudence will be vindicated ; if not, jurisprudence will prove to be but an empty name.

Assuming, however, its own real existence, and therefore its necessarily implied conditions, jurisprudence should begin by determining the reason of the law, and, in determining the reason, determine the form of the law ; that is, its several particular rules or principles. With the reason and form thus defined, a particular instance, such as the rights involved in a given litigation, can be determined by demonstrating that it is governed by some one of these principles. Thus the juridical procedure takes a form which in its lowest terms is a syllogism, wherein the major premise is the predication of a juridical principle, the minor premise is a predication that the case at bar comes within its terms as an instance of it, and the conclusion is the joinder of the two in the final judgment of the court. The ascertainment of the major premise is the province of the jurist through the process of logical reasoning ; the ascertainment of the minor premise is the province of the court through its process of investigating facts ; and the conclusion — that is, the judgment — follows, or should follow, inevitably upon these two. The jurist, then, whether a scholar writing a treatise, or a judge delivering an opinion in the course of a judicial proceeding, must first, if his major premise be a new or not hitherto recognized principle, establish his position by a correct process of reasoning. If, for example, he asserts a principle of unjust enrichment, or a principle of restitution, he must carry his proofs back to a point where he reaches only the necessary postulates or conditions of law ; or if he chooses to begin his argument at a point short of the necessary postulates, — that is, with unverified assumptions of certain results of prior logical reasoning, — he must at least make certain that his assumptions will not be questioned. Otherwise his argument will have only the weight of an assertion of his individual opinion, which in the realm of an applied law based on a system of precedents may indeed be considerable, but in the domain of reason will be naught.

The reason of municipal law must accord with the constitution of society. Even if law be supposed to be but the reflection of a higher legislating will external to society, and manifesting itself by divine revelation or otherwise, there must be either an accord or an opposition between the constitution of society and any such will. If there be an opposition, it follows that the will legislates society's ultimate destruction. Such a will, however, would defeat itself, and cannot be supposed. The assumption of jurisprudence, therefore, is that the reason of the law is in accord with the social constitution, and indeed the most superficial student would agree that that is the soundest jurisprudence which most closely harmonizes with the form of society.

The researches of scientists into the doctrines of evolution, and the wide diffusion of their results, have made the similarity between the form of society and the form of living things in general a matter of common knowledge. Both are recognized as organic; but the full content of that term is by no means clearly understood. The discovery bears most important consequences, which cannot be appreciated, however, until the essential organic nature is more fully defined. It would be apart from my subject to enter into all the complicated analyses that are involved in the organic idea, but one fact, which bears immediately upon the nature of law, may be indicated at once, and that is, that within the organism there exists a most complete mutual dependence between part and part and between part and whole, between organ and organ and between organ and organism. If one organ fails to perform its functional office, the organism as a whole suffers, and likewise the other organs. On the other hand, if the organism as a whole fails in its general organic activities, the failure intimately affects every organ. Thus, if in the animal any one organ should fail in its functional activity, if the heart should cease to supply blood to the other organs and to the general system, the animal would languish and die, and in the general death would be involved the death of all the organs. Again, if the heart should fail to furnish blood to any one organ, like the limbs, it would become useless, and as a limb would die. So, too, if the whole animal should refuse to carry on its general activities, or should cease to provide sustenance for its several organs, they would become useless from lack of exercise or from inanition. In fine, the animal and its organs subsist only in a general relation of interdependence of part and

part, and of part and whole, — a relation which may fitly be designated by one word, reciprocity. Reciprocity, then, indicates a unitary principle with a twofold application, according to the terms of the relation, — the reciprocity between part and part, and the reciprocity between part and whole. In each application it is to be also observed that it possesses a double aspect. It means the necessity of, *first*, the integrity of the organ in the exercise of its own organic functions, and, *second*, its co-operation with the other organs and with the whole organism in the exercise of their several organic functions.

The principle of reciprocity so ascertained and defined in the organism is capable of the most precise and exact application to the social body, which is itself an organism. In the new application, the individual takes the place of the organ, and the community at large takes the place of the organism as a whole. With this interchange of terms, we find a mutual dependence between the several individuals on the one hand, and between each individual and the community at large on the other, and we find also the double aspect of the relation in the necessity of freedom to each individual in the performance of his own function, that is, in the free development of his own life, and in the necessity of co-operation by each individual with others in the performance of their functions, that is, in the free development of their lives. The perception, in a more or less crude form, that this reciprocity is a principle of the social order, is one of the oldest heritages of thought in the possession of our race. It dates back certainly as far as the well known fable of the belly and the members, as told in the ancient days of Rome, and the separate aspects of it have caused the difference between the egoistic and the altruistic schools of morals. One set of philosophers seized upon its selfish aspect in the necessity of individual freedom, and, making the individual's happiness the ultimate goal, became the egoistic school in all its manifold forms. Another seized upon its disinterested aspect in the necessity of co-operation among the members of society, and, making the community's happiness the ultimate goal, became the altruistic school in its equally manifold forms.

A principle of reciprocal dependence, however, is not enough by itself to constitute the basis of a rationally sufficient theory of morals. Taken by itself it is not in any sense a law, that is, a rule of action, because it imports neither a necessity nor an obliga-

tion of conformance. To be the basis of moral theory it must be applied to morally responsible beings, to beings, that is, endowed with a freedom of initiative. It cannot, therefore, as to them be a rule of necessitated action. Moreover, it cannot without proof be assumed to be a rule of obligatory action, because that involves the unverified assumption of the existence of a moral obligation. It is true that obedience to the principle of reciprocity is essential to the maintenance of the social order, and even, in a large aspect, to the existence both of the individual and of society; but to prove so much is to prove simply that reciprocity is a mere condition from which the utmost inference that can be drawn is that it is to the interest of society and of its members to conform to their conditions of existence. It is an invalid inference that such conformance is obligatory. If individuals refuse to conform, they will, to be sure, their own destruction and the destruction of society; but there is nothing in mere reciprocal dependence to forbid their willing such destruction, except the destruction itself. There has been much misconception on this matter, and in many ethical theories, notably the utilitarian, the effort to convert a mere mutual dependence between individuals, without more, into an obligation of altruism has been most strenuous. It has been a fruitless task, however, and those who have tried it have not permanently satisfied the demands of reason. Unless therefore more inheres in this relation than has yet appeared, neither the necessity nor the obligation of conformance obtains with respect to the conditions of reciprocity. A more careful inquiry into the nature of law is necessary.

In a mere static universe, wherein all things should be fixed and nothing should change, an intelligence of sufficient capacity might supposably discern certain formal relations, such as those of position, number, and likeness; but these are all that could be discerned, and all that would be intelligible. No one form of such a universe would be more intelligible than another. Even if it were arranged in an order of stellar systems, with suns, moons, and planets, with perhaps forms of trees, mountains, and temples, these would be no more intelligible than irregular forms for which no name exists. There would be only these spatial and numerical relations, which could be as easily measured in the one case as in the other. Such a universe, however, could not in any part of it be seen, or heard, or tasted, or perceived by any physical sense,

since all sense-perception is based upon vibratory motions of matter, which are inconsistent with the hypothesis that all is static. Indeed, it could not be perceived even by an act of pure intelligence, for it is a violation of our hypothesis of unchangeability to suppose that in such a universe a perceiving mind could exist, since perception involves action of the perceived on the perceiver and reaction of the perceiver to the perceived, and action and reaction involve change. Such a universe, then, might conceivably exist, but it could never be known to exist.

Introduce change into such a universe, but change only. The resulting conception of a universe of constant change is not new; it existed in the ancient notion that the universe is a mere fortuitous concourse of atoms. Now this conception involves the notion of time, for change means a succession of events marked in time; but this is the only addition to our prior conception. There is at any rate, so far as the hypothesis yet permits, no possibility of cause and effect. The impact of one body upon another would produce no change in either. Change might, or it might not, follow; but, even if it did, by hypothesis it would not be the effect of the impact, and would not therefore be produced by it. Sensuous perception of such a universe would be as impossible as in a static universe, for all forms of sensuous impression involve, not only vibration of matter, but also effects of vibration. That is, the vibrating matter must cause the perception in the perceiver; but cause and effect are excluded from our hypothesis. By a parity of reasoning, intellectual perception is impossible, because perception of all kinds involves the very causal relation which is rejected from our supposition. Like the purely static universe, therefore, a merely flowing universe might conceivably exist, but it could never be known to exist.

From these considerations it follows that, in order that the external universe should be known at all as a self-subsisting reality, there must be something contained in it beyond the mere flux of hurrying atoms. There must be such a relation between the parts that one change necessarily produces another comparable to, and measured by, the former. A relation of this character we call a law, — a law of causality or of necessity. Such a law is inseparably involved in the act of knowing, and therefore knowledge of the mere existence of an external universe indubitably proves the existence of a law of necessary causality.

Let us now introduce into such an external and intelligible universe, governed as we have seen by a law of necessary causation, human beings endowed with a freedom of initiative. Such beings, so far as they possess a material constitution, will be subject, of course, to the necessary laws of matter. They are, however, capable, under our hypothesis, of themselves setting in motion chains of causes and effects which have no antecedent cause other than the volition of the beings themselves. This is the meaning of freedom. These volitions, however, considered alone, have no explanation, so far as we have yet supposed. They are mere whims, of which nothing more is to be known than is to be known of the unconscious and unregulated motions of infancy. Indeed, that is all they are. If, however, we further predicate intelligence of such beings, a new but real element of intelligibility is added, to wit, the thought or intention manifested in their volitions.

The mere supposition of intelligent and freely volitional human beings, however, bears no very important consequences. Such beings would be wholly unrelated, except in three particulars. They are of course under the relations of space, time, and the other purely formal relations; they are subject to the law of causality; and they may voluntarily relate themselves to each other by joining in common purposes; but with that their relatedness ends. Two of them, for example, of opposite sex, might voluntarily cohabit and beget children. The children would be the effect of their parents' cohabitation, and the parents would be the cause of the children; but any further relation would depend solely upon the volition, not of the parents only, but of the children as well. To suppose anything more is to violate our hypothesis. Under such conditions, there could be no family in any legitimate sense of the word. So, too, society would not exist otherwise than as a mere social compact, dependent upon the actual will of each individual member, and since the possibility of a will to unite necessarily implies the possibility of a will to disunite, it would have no elements of continuity superior to the changing desires of its members. The form of such a society would be at any given moment but the form of the conjoint wills of its members. Those wills, however, would change with no more reason than the shifting desires of those at the time composing the social body, which therefore would lack every element of stability and of permanence. It would be particularly true that there would be no continuity of

form in the change from one generation to the next, and historical unity would be impossible.

From these considerations, it follows that human beings to exist at all in a social body possessing a unitary form must exist according to some principle of unity apart from their volition and yet affecting it. It must be a principle relating free activities, but not necessitating their action. The difficulty is to reconcile such a principle with the freedom of the activities which it relates. It must be on the one hand universal, and on the other consistent with the possibility, in fact the actuality, of non-conformance. On the one hand, if it were not universal, it would be only occasional, and not therefore a general principle at all, and on the other hand, if conformance were a necessity, there would be no freedom in the individual. The reconciliation of these two can be found only in a universal principle, non-conformity to which is possible, but conformity to which is *obligatory*, that is, in a law, not of necessity, but of obligation. Whatever, therefore, may be the unitary principle of society, it involves an obligation of obedience, without which society is but a meaningless name.

In the foregoing discussion of necessity and obligation, it is to be noted that the argument falls short of actually proving the existence of either. It succeeds, supposing it to be valid, in showing only that necessity and knowledge of the universe as an existent reality on the one hand, and obligation and knowledge of society as a unitary body on the other, are inseparably connected terms, and that if one term in each pair is true, the other is true also. Now, as a matter of fact, both the knowable reality of the external universe and the unity of society except as a mere social compact have been denied, the former by certain despairing philosophers whose sect is not even yet extinct, and the latter by the early sociologists whose theories are at the present time substantially rejected. To discuss these problems is not within the province of jurisprudence, and I shall assume, therefore, without argument, both the reality of the universe and the unitary character of society, and hold them as proof of both necessity and obligation. But more than that: they constitute, like rationality and freedom, the necessary postulates of jurisprudence as a science, without which it cannot exist except as a figment of the imagination. If human beings are not causes, they cannot be juridically responsible for any effects. If they are not united in bonds other than those

of their voluntary forging, juridical responsibility is nothing but the force of the majority constraining the minority, and jurisprudence has no place except as a science of the will of the majority, which may change as it chooses, and therefore cannot be the basis of a rational science. Causality as the antecedent condition of juridical responsibility is thus the third postulate of jurisprudence, and obligation as the antecedent condition of juridical relation is its fourth postulate.

Having ascertained then that, whatever may be the principle or universal element which makes society society, it must necessarily have the sanction of moral obligation, and having ascertained that the principle of reciprocity is that unitary principle of society, we must conclude that the principle of reciprocity is itself a principle of moral obligation, or in other words is a moral law. Indeed, in looking back upon our analysis, we can see that it is insufficient if it contents itself with finding that the condition of social existence is summed up in a mere interdependence of individuals upon each other. The condition is more than that: it involves necessarily an obligation. Society and the individual alike are incapable of existence except under law. The possession of freedom is unintelligible except as in and with responsibility for its exercise, and to speak of a free and intelligent but irresponsible being is in truth to speak a contradiction in terms. If, then, my argument is correct, the principle of society is the principle of reciprocity, and the principle of reciprocity is a law of obligation.

Two things are to be observed about this law of reciprocity. It does not lose its quality as a condition in becoming a law, since it could not be that disobedience to it as a law should be fraught with less serious consequences than disobedience to it as a condition; and again its content as a law, the thing that it prescribes to be done, is precisely the same as the positive content of the organic law in the non-personal organism and in the organic universe. It is in fact the organic law of the universe shorn of its quality of unconscious necessity, and given to the hands of freely volitional and intelligent beings as a trust obligation to be consciously obeyed. It is thus that the evolutionary nexus between man and the lower organic forms, historically actual as we now believe it to be, is also rationally possible, if not rationally necessary. In the process of evolution the organism becomes person; in the same process the organic law becomes personal and the necessary becomes obligatory.

Reciprocity, then, is a law of obligation which creates ethical relations between two or more persons, or between persons and society. These relations may be regarded from the point of view of either term. From one aspect they are usually called obligations, and from the other rights. The two words are thus but antithetical names for one and the same relation. In the self-regarding or egoistic aspect the relation concerns the free self-development of each member of society. To interfere with that is a breach of the obligation of reciprocity, which, so far forth, is to respect such freedom and refrain from interfering with it. The obligation being from the other view a right, each member of society has a right of free and uninterrupted self-development, which may for shortness be called his right of freedom. In its other regarding, or altruistic aspect, the obligation of reciprocity concerns the assistance due from each member within the social body to his fellows and to society, and due from society to each of its members. To refuse to render such assistance is a breach of the obligation of reciprocity, which, so far forth, is to render such assistance. Each member then has the right to such assistance, which may for shortness be called a right to co-operation. Thus two great classes of ethical rights are at once established.

It may be noted in passing that the fullest performance of the altruistic obligation depends upon the fullest enjoyment of the egoistic right, and, conversely, that the fullest enjoyment of the egoistic right depends upon the fullest performance of the altruistic duty. It is only upon the condition that the individual and society are possessed of their utmost powers that they can render efficient aid to others, and it is only upon the condition that others assist them that they can themselves attain their highest development. It is thus in a very real sense true that the individual's highest self-development is a duty which he owes to others, and that their co-operation with him is their right which he must respect. In a manner, therefore, the principle of reciprocity returns upon itself. These considerations bring more clearly to view the essential unity of the principle. Egoism and altruism, instead of being a conflicting duality of opposing forces, are harmonized into one law of distinguishable but inseparable aspects. Finally, be it observed, the organic relations which this principle involves would not be enlarged by showing the individual to be a member of another than the social organism. The same reasoning would

hold true, and would result, not in a new definition of the individual's ethical status, but in the discovery of new terms for relations already clearly defined. His right and duty would be the same, but those from whom they are due and to whom they are owed might be different.

Human beings are more than organisms; they are persons, with the power of freely conceiving purposes and of freely communicating them. In this power of conceiving and communicating purposes lies the power of promising their fulfilment. Now it requires no argument to show that upon the general fulfilment of promises depends the whole fabric of society. The vast and intricate system of commercial credit is but one empirical proof of this proposition. If the usual custom were to break promises instead of keeping them, three generations would suffice to restore the civilized world to utter barbarism. The social interest lends, therefore, as one exemplification of the law of reciprocity, to every promise the sanction of organic obligation. The promise, in other words, being a voluntary relation established between members of an organism which, without the organic law, would be optional and terminable at will, is with it affected with the organic character, and is therefore obligatory. Such obligations, of course, are defined by the parties, and are precisely determined by the terms of the consent, and may therefore be as various as thought itself. Their variety, however, does not defeat their obligatory character, and promises are to be classed as a third group of ethical relations.

The rights thus deduced from the organic idea may be classified as follows: —

Organic . .	A. Right of freedom.
	B. Right to co-operation.
Personal . .	C. Consensual rights.

This classification of rights is exhaustive. They are deduced from man's relations to the external universe and from his own internal constitution, and these are the only sources from which such deductions can be drawn. It remains to consider the relations of law to ethics, and thence to deduce a classification of legal rights.

The law of reciprocity commands society as well as the individual. Society has its right of freedom, and also its duty of co-operation. Its organization in the form of states and nations is but the means to these two ends, and in particular the establishment of tribunals of justice is a means both to its self-development

and to the performance of its duty. In punishing crimes and misdemeanors, and in adjudicating between citizens, it is therefore but obeying its organic duty and enforcing its organic right, as these are defined by the law of reciprocity. No state fails utterly in this function. To a greater or less extent, with a greater or less degree of intelligence, and with a greater or less approximation to the ethical standard, every community that ever existed has administered some form of justice, and maintained some forum for its administration. Indeed, there is no criterion whereby to judge the progress of a community in civilization which is more fundamentally sound than the success it has attained in the administration of justice. The ethical law is thus at once the reason of the municipal law and the substance of its commands.

Ideal justice would obtain were the state able to lend its sanction to the ethical law in its entirety; but that is obviously impossible. It is still true, however, that the state should proceed in its duty so far as its powers will permit, and this is substantially recognized in the maxims of the law. *Ubi jus, ibi remedium.*[1] In any new case, therefore, the investigation into the limits of law should properly resolve itself, supposing the ethical status to be clearly ascertained, into an investigation of the limits of judicial power. In view of these considerations, I venture to hazard this definition: *Municipal law is the command of society through its constituted authorities, founded upon the ethical law of reciprocity as the reason of its command, and, to the extent of its power, re-enacting that law as the standard of conduct for its citizens.*[2]

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[1] An interesting and perhaps the latest case indicating that this is the just attitude of the courts is Kujek *v.* Goldman, 150 N. Y. 176.

[2] It will be observed that this definition approaches very closely to the definition of Blackstone, "a rule of conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 Comm. 44. The criticism of Christian upon the final clause of this definition, that, if right and wrong are referred to law, the proposition is tautological, and that, if they are referred to an external standard, it is not true in fact, since the law prohibits many things that ethically are right, will occur to every reader. 1 Comm. 44 (Sharswood's ed.), n. 8. This criticism proceeds upon a probably mistaken notion of the meaning of the obnoxious clause. What Blackstone probably intended to indicate by it is the general command of the municipal law to be ethical, which necessarily accords with the ethical law. He probably did not intend its particular commands to do or not to do particular acts, — commands which may not be, and in fact often are not, ethically right. It is this general command which my own definition is intended to indicate. I have added the clause "founded upon the ethical law of reciprocity as the reason of its command," as expressing more fully the rational nature of the command, and have used the phrase "society through its constituted authorities," instead of "the supreme power in the

This conception of law renders possible a simple and intelligible classification of legal rights upon the basis of the previously ascertained ethical rights. It is a strong confirmation of the classification which I shall now offer, that it conforms with great accuracy to the usually accepted classifications.

In the first place comes the right of freedom. As has been seen, it is a negative right, requiring forbearance rather than active doing. It embraces within its scope, therefore, the whole class of torts. Assaults upon the person, property,[1] or reputation are but instances of its violation. The conception of this right as a subject of legal protection has greatly advanced within late years. The real need now is that all the various classes of torts, such as assault and battery, nuisance, libel, and the like, should be recognized as but separate instances of one unitary right. Much has been accomplished in this direction already,[2] and the right of freedom may justly be classed among the citizen's legal rights.

The duty of co-operation follows after the right of freedom. It is positive in its nature, requiring active performance rather than forbearance. The citizen owes it to his fellow citizens to be generous with his possessions and kindly and charitable in his speech. He owes it to the state to devote a proportionate share of his time to his civic relations, and a proportionate share of his property to the support of the civic institutions.

Duties which are owed directly to the state are sometimes made the subject of the state's express command. They do not constitute direct legal relations between individuals, however, and are not therefore within the purview of this article, which is concerned only with the rights of individuals *inter se*. Duties of the latter kind, running to individuals directly, have very rarely received the enforcement of law. They involve too many considerations of re-

state," because the command is the command of society as an organized whole, and not of any part of it. With these two exceptions, the substance of the definition is the same, although there is still some variance in phraseology.

[1] I once ventured upon an analysis of the legal notion of property in an article entitled "Police Power and the Right to Compensation," 3 HARVARD LAW REVIEW, 189. It is proper to add, that that article was written before I had arrived at the present theory of torts. Subsequent consideration only confirms me in the views then expressed.

[2] See the able and conclusive article of Messrs. Warren and Brandeis in 4 HARVARD LAW REVIEW, 193. Also the case of Schuyler *v.* Curtis in its various stages: on motion for preliminary injunction, 27 Abb. N. C. 387; on appeal from injunction order, 64 Hun, 594; on the merits at the trial, 30 Abb. N. C. 376; on appeal from the final decree, 147 N. Y. 434.

mote and difficult character to receive adequate handling by any merely human tribunal. The obligation of assisting other individuals in their private pursuits, as, for example, by giving alms, must necessarily lie largely, if not entirely, within the sphere of individual determination, because it involves an element of self-sacrifice. Some self-sacrifice is demanded from each member of society, but what and how great it shall be is left to the conscience of the individual. Others cannot decide such a question for me, nor I for others, and even the most perfect and enlightened jurisprudence would refuse to enter upon such an undertaking. As a general rule, then, it is true that the state has refused to lend its sanction to the duty of co-operation as between its citizens.

There are certain notable exceptions, however. The state may, in pursuance both of its right and of its duty, declare that certain acts are so important to the general welfare that a specific obligation to perform them should be laid upon its citizens, and hence result certain statutory duties, such as the duty of abutting owners to keep their sidewalks clear of snow. The act of the legislature decreeing them is but declaratory of the previously existing ethical obligation. If it were not declaratory, it would be without the justification either of the right of the state or of its duty, and therefore in contradiction of its own organic law. In all communities, however, mistakes may and do occur, and it sometimes happens that really unjustifiable laws are in fact promulgated. Such laws have the exact force of the state behind them, and nothing more; but to that extent they become for the citizen real rules of conduct, and must be accepted as part of his legal duties. Such duties, as has been said, are commonly owed to the state; but there are instances where they are owed by one citizen to another. Such a case is that of half-pilotage fees, mentioned by Professor Keener. A California statute imposed upon masters of vessels the duty of employing pilots in the harbors of the State, and provided that, when a vessel was spoken by a pilot and his services were declined, the master should nevertheless pay him half his usual fee.[1] The justification of such a statute lies in the public need. It in effect imposes a tax upon the individual for the preservation of harbors and of human life, and it supports quasi-public officers to secure those two objects.

A curious instance of such a right existing independently of

[1] Steamship Co. *v.* Joliffe, 2 Wall. 450; Keener on Quasi-Contracts, 16.

statutes is the so-called "spurious easement" allowed in England, whereby the owner of a parcel of land could, without a contract, call upon his neighbor in certain circumstances to maintain the fences between their lands. If the right is sustainable on theory, which seems very questionable, it imposes upon the defendant a positive, not a negative duty. It seems to be due to custom.[1]

As has been said, these altruistic duties involve an element of self-sacrifice, and it is doubtful if the courts have the power of their own motion to require any such sacrifice, though of course, if the state should command it by statutory enactment, the courts must afford such remedies as they can. Even the legislature, however, should be, and is, chary of issuing such commands, and the condition of them should lie in a direct public need; and, so far as I am aware, with the exception of the spurious easements just mentioned, the courts in English-speaking jurisdictions have never undertaken to enforce a positive duty of this character without legislative support.[2] That they may recognize the existence of the duty of co-operation without attempting to compel its performance is, however, quite clear. A very striking and just instance of this is the case of Henry Eckert, who tried to save a child's life at the risk of his own by snatching it from in front of an advancing train, and was killed in the attempt.[3] The court rightly overruled a plea of contributory negligence in an action by his administratrix for damages. No court would have compelled him to take such a risk; but, when it was taken, the court was compelled to recognize its high ethical character, and the consequent legal right to run it, when, without such a reason, it would be legally unjustifiable. There are undoubtedly other instances of the recognition or enforcement of the right to co-operation, but these will suffice to show the existence of positive duties owed by one citizen to another. So far as they are enforced by law, they constitute legal rights. Like the negative rights, of which a violation is a tort, they should strictly be regarded as but instances of one unitary right. So regarded, each citizen has, under many limitations and circumscriptions, a legal right to co-operation.

Consensual rights are almost uniformly enforced. I have purposely used the word consensual instead of contractual, because

[1] Lawrence *v.* Jenkins, L. R. 8 Q. B. 274; s. c. 2 Gray's Cas. on Prop. 324.

[2] See, however, the discussion of the nature of contribution, *post*, p. 506.

[3] Eckert *v.* Long Island R. R. Co., 43 N. Y. 502 (1871).

there are many non-contractual rights which nevertheless receive abundant protection from the courts. A contract requires not only consent, but also a consideration. The beneficiary of an express trust has usually given no consideration whatever for his rights. They are, however, created by consent, are defined by consent, are terminated by consent, and withal are most favored in law. Consensual rights therefore are the third class of legal rights.

If the foregoing arguments have been sound, the following is an exhaustive classification of the legal rights which may belong to any individual: —

Organic . .	A. Right of freedom.
	B. Right to co-operation.
Personal . .	C. Consensual rights.

It remains now to consider the effect of a breach of right, and it is to be observed in the first place that a breach does not terminate a right, because if it did it would be possible for any person or society to terminate its obligation (the correlative of the right) by a mere refusal to perform, and obedience would in effect become merely optional. Such a result is inconsistent with our premise, that obedience is obligatory, not optional. A right then can be terminated or destroyed as between the parties only by the consent of him who owns it, and the effect of a breach is, not to destroy the obligation, but, at the most, to change it.

The organism, like the chemical molecule, is a system of delicately adjusted and balancing parts, and a breach of a right is therefore the disturbance of a position of organic equilibrium between the parts of the organism. Justice, then, lies originally in the maintenance, and secondarily in the restoration, so far as possible, of that position of equilibrium. The duty of him who commits a breach of obligation is therefore to put the injured person as nearly as possible into his former position. Such a duty is merely secondary, arising only upon a breach of some one of the original obligations. It is the secondary obligation, however, that is usually enforced by the courts, since it is rarely the case that they are able to prevent the breach of a primary obligation. It is sometimes accomplished, however, as by an injunction against a threatened trespass; but, with exceptions of this character, in all contentious cases the judgment of the court is a declaration of the secondary duty of the defendant, reinforced by the power of the court through its judicial process to compel performance, and

the obligation upon a judgment is but this secondary obligation so judicially defined and sanctioned.

The remedy for a breach of a right is that judgment which the court will render, and the possible remedies for each class of rights are readily ascertainable. For reasons of convenience, I shall consider first the duty of co-operation.

The right of co-operation is a positive right, requiring active performance, and a breach of it is an omission. In the case of a positive right the court may compel the defendant to repair his omission by doing the very act which the obligation prescribes and which the defendant has left undone. The obligation to maintain fences was thus specifically enforced at common law by the writ *de curia claudenda*, which required the defendant actually to build the fence.[1] This remedy may be called specific reparation of the breach. There is another and more usual remedy, however, in the award of damages, which by antithesis may be called reparation in value. The damages are of course the amount of money necessary to put the plaintiff in a position as good pecuniarily as that which he would have occupied had the obligation been performed. The distinction between specific reparation and damages obtains even when the obligation is to pay money. If the court should order the defendant to make the payment himself, and should enforce its mandate by the process of contempt, that would be specific reparation. If it should undertake to make the payment itself out of the defendant's property by a writ of execution, that would be damages.

The right of freedom is a negative right, requiring forbearance, and a breach of it is a fault of commission. Specific reparation, then, in the complete sense of doing that which the obligation prescribes, is of course impossible. The defendant's obligation was to refrain from acting; but having broken his obligation by acting, he cannot so turn back the hands of time as to undo his act and then refrain from acting. Damages, however, or reparation in value, are quite possible, and are in fact the most usual remedy.

There is a remedy other than reparation possible in some cases of torts. Reparation looks only to the plaintiff's loss; but in some cases the defendant acquires something by the wrong, and in that case he must restore what he has received. Thus, if the defendant commits an assault and battery, the plaintiff suffers damage, but the defendant has acquired nothing. On the other hand, if the

[1] Lawrence *v.* Jenkins, L. R. 8 Q. B. 274; s. c. 2 Gray's Cas. on Prop. 324.

defendant converts property of the plaintiff to his own use, the plaintiff not only loses the property, but the defendant gains it. Now the defendant's original obligation was to refrain from interference with the property, and this obligation still continues. His continued retention is a continued breach of this duty, and there is but one way in which he can end the breach, and that is by returning the property in the very form in which he took it. His negative obligation not to interfere is thus transformed by the breach into a positive duty to restore. This secondary obligation is frequently enforced by the courts. The action of replevin as common in American jurisdictions is one mode of enforcement, and the equitable remedy of declaring the defendant a constructive trustee of the property and directing him to return it is another. This may be called specific restitution.

There are other cases in which the plaintiff, because what the defendant has gained is lost, destroyed, or for some other reason is incapable of restitution, is unable to have specific restitution, and there are still other cases in which he may not care to have specific restitution, even when it is possible. In such an event, he is allowed to recover the pecuniary value of what the defendant has received. This may be called restitution in value as distinguished from specific restitution. Usually, of course, the measure of restitution in value would equal the measure of damages, but it might at times differ considerably. Damages would be computed solely on the plaintiff's loss, without reference to what the defendant should profit; but restitution in value would be measured by the worth of the property in the defendant's hands, which might be greater or less than the plaintiff's loss.

It remains to consider the modes of remedy upon the breach of a consensual right. These rights may in some cases be positive, requiring the defendant to act, and in them specific reparation is often possible. Such a remedy is common under the name of specific performance. Reparation in value, or damages, is possible in all cases, and is in fact the most common remedy. Further discussion of these remedies is not necessary.

In all instances of a breach of right, the plaintiff may forgive the wrong, or, to use the more technical term, may waive it. The essence of such an act, however, is that the defendant in effect denies the right, and the plaintiff yields it up. It is the conjoint action of the two, therefore, which destroys it. This is as true of

consensual rights as of others. A breach is, so far as the defendant is concerned, inconsistent with his obligation, and the plaintiff may take him at his word and himself regard the right as non-existent. This in the case of contracts is called rescission. In some cases, however, the right is called into existence upon the delivery from the plaintiff to the defendant of something valuable in return for the right, and what is so delivered — which, it is to be noted, may be either property or services — is called a consideration. An undoing of the obligation will in such a case be complete only when the defendant returns the consideration which he has received. If under such circumstances the defendant both refuses to perform his obligation and also to return the consideration, the two positions are inconsistent, being at once an affirmance and a denial of the contract, and they immediately afford the plaintiff an alternative. He may enforce the obligation by way of either specific reparation or damages, as the case may be, or he may declare the obligation at an end and recover his consideration. The latter, then, is alternative to damages, and between the two the plaintiff has an election.

The right of rescission is not limited to a recovery of the consideration, in the strict and technical sense of the word in our law. It extends to whatever property or advantage the defendant has received from the plaintiff upon the faith of the obligation, even though it cannot in strictness be called a consideration. Whatever it be called, upon a rescission of the obligation, the defendant is under a duty to restore what he has gained or its value, and the plaintiff has his remedy of restitution. The gain may be restored in its original specific form, in which case the plaintiff will have specific restitution, or its worth may be restored, in which case the plaintiff will have restitution in value.

These various possible remedies may now be re-grouped, not according to the rights from which they spring, but according to their form and quantitative value, and this re-grouping may be diagrammatically represented as follows: —

A. REPARATION.
   1. *Specific.* (Possible if the obligation is positive.)
   2. *In Value.* (Possible in all cases.)

B. RESTITUTION.
   1. *Specific.* (Possible if the defendant has obtained pro-

perty of the plaintiff by means of a tort, or upon faith of a consensual right, and the property can be restored.)

2. *In Value.* (Possible if the defendant has received a benefit from the plaintiff by means of a tort, or upon faith of a consensual right.)

The resemblance between restitution in value upon the breach of a consensual obligation and the similar restitution upon a tort is purely quantitative. It is so exact, however, in that particular that the two forms of the obligation may be conveniently, though perhaps not very scientifically, treated together. In every case of restitution in value, inspection shows that there are four conditions to be satisfied. In the first place, the plaintiff must have lost something; in the second place, the defendant must, have gained something; in the third place, that which the plaintiff has lost must be identically that which the defendant has gained; and, in the fourth place, there must have been a breach of right, which may be a breach of a consensual right or a tort. If any of the first three conditions do not obtain, there is nothing to restore, and if the fourth does not obtain, there is no duty, since the plaintiff cannot ask a remedy where there is no wrong.

The principle of restitution in value, by reason of its rather unscientific character, probably cannot be stated in a form that is satisfactorily concise; but perhaps the following will serve: *Upon a tort or upon the breach of a consensual obligation the defendant shall restore the value of whatever the plaintiff has lost and he has gained.*

This principle of restitution in value, or, more shortly, restitution, I believe to be substantially what is intended by Professor Keener in his doctrine of unjust enrichment. That doctrine, however, has been applied by him to many cases which cannot come under the head of restitution, and it is necessary now to ascertain the differences between the two.

In the principle of unjust enrichment, three elements must obtain, — expense of the plaintiff, enrichment of the defendant, and, finally, injustice. Now, it is clear that expense of the plaintiff and enrichment of the defendant in the one principle are identical with loss by the plaintiff and gain by the defendant in the other. The condition of restitution, however, that what the plaintiff loses must

be the identical thing that the defendant gains, does not appear in the doctrine of enrichment, nor does it appear that by injustice is intended merely a tort or a breach of a consensual obligation. In every case, however, where, in addition to the conditions contained in the doctrine of enrichment, it is also true that the injustice lies in a breach of a consensual obligation or in a tort, and that the property or service whereby the defendant is enriched is also the property or service which the plaintiff has lost, the principle of restitution is applicable. The cases cited and discussed by the learned author in his chapters entitled "Waiver of Tort" [1] and "Obligation of a Defendant in Default under a Contract," [2] almost uniformly fall within the lines of both doctrines, and so far as that is true I am glad to avow myself in accord with the learned author. A particular discussion of such cases, therefore, is not necessary. It is in the discussion of cases in which the two principles differ that the greatest intellectual profit and the clearest mutual understanding lie, and therefore, ungracious though it seem, it is on the differences rather than on the agreements that stress will be laid.

As has been seen, the word unjust may have a wider scope than merely the breach of the obligations enumerated in the principle of restitution. It behooves the careful critic, therefore, to analyze the distinction between the two. Now the learned author has attempted no definition of injustice. This cannot be regarded as otherwise than a very serious and fundamental omission by a writer who is endeavoring to establish a new principle based upon justice. It necessarily invalidates as an argument every discussion upon which he enters, simply because it deprives him of a major premise. There are for him no criteria of the general class of unjust acts whereby to determine a given case. We may admit, for argument's sake, that a tort is an unjust act; but if some other reader less tolerant should refuse to make the admission, how could the author substantiate his position that one who enriches himself by a tort is unjustly enriched? This is, of course, an extreme case, and the learned author may say, with some justice, that he had no intention of writing a book on jurisprudence in general, and that he took certain results of jurisprudence as fully determined. This plea will not avail him, however, in cases where there are no such fully determined results. Thus he concludes that the plaintiff should be allowed to recover from the defendant in a case where

[1] Pages 159–213. [2] Pages 267–314.

the plaintiff has rescued the defendant's property from destruction without request (the defendant being quite ignorant of the danger), but expecting nevertheless to be compensated for his services.[1] Having no principle of justice, the author can only say that it seems to him unjust that the defendant should not pay for the benefit received, and in fact that is all that he does say. He does, it is true, argue that the preservation of property is beneficial to the public as well as to the owner, and that therefore the public interest should weigh in the plaintiff's favor; but he destroys his own argument by admitting that, if the plaintiff expected no compensation at the time of rendering the service, when the public interest would have been just as great as if he had expected compensation, the plaintiff should not succeed. His position, therefore, resolves itself into a mere statement that it is unjust that the defendant should not pay the plaintiff, and he has no valid argument to meet the counter proposition. It is worthy of remark that in this particular instance he admits that the weight of authority is against him.[2]

The absence of definition renders it impossible to construct such a notion of his theory as will render criticism of it either profitable in itself or free from the charge of not accurately representing him. The utmost that can be done is to consider some of his specific instances. The first to be considered will be a case in which, agreeing with the learned author that there is injustice, I should find it in a breach of obligation. A second will be a case in which I can find no injustice, because there is no breach of obligation, although the learned author holds otherwise. These two will suffice to define the difference of view.

1. In Exall *v.* Partridge,[3] the facts were these. It was at that time the law of England that a landlord to whom rent was in arrear might enter upon the premises, and seize by judicial process and in satisfaction of the rent due whatever property might be found there, whether it belonged to the tenant or to somebody else. The defendants, of whom there were three, had all been originally tenants of one Welch, but two of them had assigned their interest to the defendant Partridge, without however procuring from their landlord Welch any release of their liability to him. They were thus under a legal obligation to the landlord to pay the rent; but as between themselves and Partridge they had no interest in the

[1] Page 354 *et seq.* [2] Page 354. [3] 8 T. R. 308.

premises, and Partridge was solely liable. The defendant Partridge was a coach-maker, and the plaintiff, knowing all the facts, left his carriage under Partridge's care. The rent being in arrears, the landlord, as he was legally entitled to do, seized the plaintiff's carriage and was about to sell it. Thereupon the plaintiff, in order to release his carriage from the seizure, paid a sum equal to the rent, and brought suit to recover the amount so paid, not from Partridge only, but from all the defendants. It was objected that only Partridge was liable.

The court sustained a recovery against all three, and the learned author, by reason of his doctrine of unjust enrichment, agrees with them. I should agree with the conclusion as to Partridge, but on grounds neither of enrichment nor of restitution, and I should disagree as to the other two.

The defendant Partridge was a bailee of the carriage, and therefore under a contractual obligation to care for it. His omission to protect it from seizure was a breach of that obligation, precisely analogous to a breach by failure to protect it from storm which to his knowledge was imminent. Indeed, in the actual case, his omission was the more culpable, since his own wrong-doing had brought about the danger. It is as if he had wrongfully diverted a watercourse from some neighbor's land, and had then omitted to protect the carriage from the effects of the water so diverted. The damage which the plaintiff suffered from the breach was precisely the amount of rent which he had to pay in order to save his property. Therefore the plaintiff should be allowed a recovery from Partridge upon his contract of bailment to the extent of his payment. The doctrine of restitution cannot apply, because, while the plaintiff suffered a loss and Partridge received a benefit, nothing passed from him to Partridge and there was nothing for Partridge to restore, and the plaintiff's recovery is only by way of damages. The doctrine of unjust enrichment is unnecessary, because there is already a remedy through well recognized principles of contract.

The discussion so far indicates a reason for agreeing with the learned author in his conclusion that the defendant Partridge is liable, but for disagreeing with his *ratio decidendi*. A discussion of the relations of the other defendants will perhaps make clearer the difference of view, although it should properly accompany the consideration of the next case.

The plaintiff's carriage was on the premises without the request of the defendants other than Partridge. They therefore owed him no duty of a consensual nature, and they committed no tort against him. Consequently the doctrine of restitution has no application to them. I can discover no obligation of any character which they owed to the plaintiff, and which they failed to perform, and therefore I can see no reason for a recovery on any theory. The learned author, however, would sustain the recovery upon the principle that the plaintiff had paid the money under compulsion, and was not therefore what he calls an "officious volunteer." [1] He does not define the meaning of officious, but apparently he regards it as a valid principle of law that, when the plaintiff has rendered the defendant a service, and in rendering it was not officious, the plaintiff can recover its value.[2] His cases which he decides according to the principle of officiousness hardly help to an understanding. For example, according to him, a plaintiff who saves the defendant's property from destruction without expectation of compensation is officious, and cannot recover, while if he had expected compensation he would not be officious and could recover.[3] I submit that such a distinction in no wise accords with the common notion of officicusness. Apart from any such verbal criticism, however, without an explanation the word lends no assistance to the decision of the question. To prove that one who *is* officious *cannot* recover is by no means to prove that one who is *not* officious *can* recover. So to argue is to commit the fallacy of undistributed middle. It was therefore, at the very least, incumbent upon the author to establish that, by precedent at any rate, the doctrine of unofficious volunteers is an admitted principle of our jurisprudence. This he has failed even to attempt, and it is at least questionable if such be the fact. Finally, the learned author has hardly shown the plaintiff to be unofficious. The plaintiff put his carriage upon the premises knowing its liability to seizure, and, so far as these defendants were concerned, without request. He was quite as officious therefore in assuming that risk voluntarily as he would have been in voluntarily paying the rent itself without request and without the seizure. Having officiously put himself in a position of danger, he cannot afterward say that he was unofficious in paying the penalty. I submit, therefore, that the learned author has given no sufficient argument in support of his proposi-

[1] Page 391. [2] Page 350. [3] Page 354.

tion that the plaintiff in Exall *v.* Partridge has a cause of action against any of the defendants except Partridge.

There is a ground in the particular case for sustaining the plaintiff's recovery, which is not adverted to either by the court or by the author. At the time of paying the rent, the plaintiff took a receipt stating that the payment was made "on account" of the defendants, and this receipt may be regarded as an informal assignment of the landlord's rights to the plaintiff, which the plaintiff might enforce in a proper form of action. Where this element is lacking, however, it is difficult to see any breach of right, or consequently any cause of action.

2. In Deering *v.* The Earl of Winchelsea,[1] it appeared that the plaintiff and defendant were sureties on separate bonds for the faithful performance of his duties by a brother of the plaintiff. The brother having defaulted in his duties, and the plaintiff having been compelled as surety to pay the whole loss, the plaintiff endeavored to compel the other two sureties to contribute to the burden in equal shares. There was no evidence of any contract to contribute. The court held that the plaintiff should recover, and the learned author agrees with the court, regarding the case as a good illustration of the doctrine of unjust enrichment.[2]

The doctrine of restitution does not apply, because the defendant has committed no breach of a consensual obligation and no tort, and also because there is nothing for him to restore, for he has received nothing from the plaintiff.

The learned author himself advances no argument in support of the plaintiff's right of recovery; but he cites from the opinion of the court a passage of which the essence is contained in these sentences: "The point remains to be proved that contribution is founded upon contract. If a view is taken of the cases it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. . . . The reason is, they the sureties are all *in æquali jure*, and, as the law requires equality, they shall equally share the burden."

With all due deference to the learned court and to the author, the point to be proved is, not that the right to contribution is founded on contract, but that it exists independently of contract. It was the latter proposition that the plaintiff affirmed and the defendants denied. But, apart from this, is the reasoning of the

[1] 2 B. & P. 270. [2] Page 401.

learned court as to equality correct? I submit that it is not. In the first place, by hypothesis the plaintiff voluntarily assumed the risk of bearing the whole burden upon his own shoulders. If he were compelled to bear it, as in this case he was, he has suffered no injustice, though it might be a hardship. In the second place, the creditor to whom the various bonds were delivered had the right to choose, among all who were bound to him thereby, which one he would sue. The bonds being separately executed and the parties being different, separate suits would be necessary to enforce them, and many reasons, such as difficulty in serving the defendants or possible defences to some of the suits, might render one suit much more advantageous to him than another. The creditor, therefore, is quite within his rights in holding one surety rather than another responsible for his loss. In the third place, the defendants have committed no breach of obligation against the plaintiff, unless their duty to contribute is an obligation. Since that obligation is the matter at issue, it cannot be assumed without proof. The equality then is that all the sureties are liable to be called upon for the whole loss, and that their risk, or chance of bearing the loss, is equal. It is not that they should all bear equal shares of the same burden. The result of holding otherwise is that a surety who voluntarily assumes a liability is enabled to throw a part of it upon persons whom he never asked to share it, who have in no wise broken any obligation to him, and whose relation to him is, so far as he is concerned, purely accidental. For these reasons it seems to me clear that contribution should never be allowed except as it is based upon some consensual right.

It must be admitted that both in this case and in the case of Exall *v.* Partridge[1] it would be a generons act on the part of the defendants to pay the plaintiff what he asks, and thence it may be argued that the courts in enforcing the liability have merely recognized, consciously or unconsciously, the fact that generosity may be enforced by them in such cases as a legal duty. In that event, the duty would be classified under what I have called the duty of co-operation. This is certainly a very arguable proposition; but certain consequences of it must be considered. Generosity involves an act of self-sacrifice. Suppose that by enforcing the performance of such an act the defendant were impoverished. Would it be just for the court to enforce it? Not every act of

[1] 8 T. R. 308.

generosity can be made legally obligatory. No court, for example, could justly take upon itself the task of saying that in such and such cases it would compel the giving of alms. If in some instances, then, it enforced the duty of generosity, and in some it refused, it will become necessary to establish some criterion whereby to distinguish those in which it could act from those in which it could not. The courts have never consciously undertaken such a task, and would undoubtedly deny their essential power to attempt it.[1]

Assuming, however, that some such principle were established, the remedy of the plaintiff is by way of damages for a breach of obligation, and not by way of restitution. Neither would it avail the doctrine of unjust enrichment. The measure of recovery is the plaintiff's loss, and it is only accidental, and perhaps not true in all cases, that the plaintiff's loss equals the defendant's enrichment. Even if it were always true, however, the result would be that the doctrine of unjust enrichment would include divergent forms of remedy ascertained by several and independent modes of analysis. It would therefore violate the canons of scientific classification. Moreover, it is an unnecessary link in the chain of reasoning, because, before the injustice is established, the rights of the parties are already determined. The doctrine is therefore mere surplusage.

It is of course impossible to meet in anticipation all the arguments that may be advanced in opposition to the principle of restitution; but there is one query which will at once occur even to those readers who possess only the rudiments of legal learning, and which bears a special relevancy to the question of justice. Where with reference to this principle are to be classified the remedies granted upon mistake? The question is so important that it should receive a commensurate attention.

The learned author assumes without argument that mistake, when the defendant has profited and the plaintiff has lost thereby, is a ground of recovery upon the doctrine of enrichment, and he has contented himself with merely distinguishing a payment under mistake from a voluntary payment with knowledge of the facts,

[1] See *ante*, p. 495. Of course, if the duty of contribution were expressly grounded upon any such theory, we should be forced to admit that the duty of co-operation is sometimes enforced by the court of its own mere motion. Until the court takes that express position, however, it is preferable to regard these decisions as based upon a misapprehension.

which, when made without a consideration, is a gift.[1] The proposition, however, that a mistake constitutes a ground of recovery is not true as a universal proposition, and, like all other such propositions, can be defeated by showing a particular instance in which it fails. The learned writer himself indicates many such instances.[2] Moreover, it is by no means an obvious proposition in any case that a mere mistake of the parties should create a cause of action in favor of one against the other. If mistake involves no breach of right, as is commonly said, how can a plaintiff ask the court to grant him relief against one who has omitted no duty? The learned author himself says, "There being no contract between the parties, unless the defendant is guilty of some wrong, the plaintiff can establish no cause of action against him."[3] He is speaking, to be sure, of the necessity of proving a tort as the basis of action in the case of restitution upon a tort, but he calls this an "almost self-evident proposition," and indeed it is. It certainly should suffice to throw upon him the burden of showing the wrong involved in mistake.

The true theory, as I conceive it, may be best illustrated in the consideration of three cases.

I. Suppose that A, with knowledge of the facts, makes an intentionally false statement of them to B, in order to induce B to pay him a sum of money.

This is a clear case of deceit, and B should be allowed to recover back the money.

II. Suppose A makes the same statement, which is false in fact, but which he honestly supposes to be true, in order to induce B to pay him the money. Before the payment, however, he learns the falsity, but, suppressing his knowledge, allows B to pay him on the faith of the representation.

This is clearly as much deceit as the former case, and B should be allowed to recover back his money.[4]

III. Suppose the same facts, except that A discovers the falsity of his statement after the payment instead of before it.

This is a case of mistake, but it is indistinguishable in principle from the others. A is as morally, and should be as legally, delinquent in retaining the money as in the other cases he was morally and legally delinquent in taking it. An action to recover back the money paid in the case of such a mistake bears much the same

[1] Pages 26, 27.
[2] Pages 32, 34, 43, 59, 71, 72, 77, and elsewhere.
[3] Page 160.
[4] Pollock on Torts, 4th Eng. ed., 265, 267.

relation to an action to recover money paid upon deceit that an action for a conversion of property by a wrongful detention bears to a similar action upon an originally wrongful taking. Mistake is thus relegated, if the analysis is correct, to the same category as deceit, and the futher question is as to the nature of deceit.

Deceit is always, so far as I am aware, classed as a tort; but it will be observed that the duty is positive, not negative. It is to tell the truth. This quality at once differentiates it from all torts. It also differs from torts proper, in that it is not an interference with any person's free activity. By hypothesis, the false statement is addressed to the individual's free volition, influencing it rather than compelling it. If there were compulsion, deceit would reduce itself to duress. Moreover, there is in all cases of deceit a meeting of minds on the point that the defendant is telling the truth. That is the understanding of the plaintiff, and that is the understanding which the defendant wishes the plaintiff to have. Then, too, the plaintiff has either of two remedies: he may rescind the transaction, restoring to the defendant what he has received and taking back what the defendant has received, which is restitution, or he may have damages, which is reparation in value. That is, the plaintiff has a right of precisely the same elements and with precisely the same remedies as those inherent in a formal consensual obligation to tell the truth.

Nor is it difficult to work out such an obligation in fact. Communication is impossible except upon a basis of truth. It is impossible to conceive a being with an intelligence sufficient to make a statement who cannot also understand whether the statement conforms to his own beliefs and realize that the one with whom he is communicating relies upon its truth. In the very nature of communication a mutual understanding between the parties is involved. It is quite as easy, therefore, to find such a mutual understanding in fact, even though it be not expressed in words, as to find a real contract when a householder orders supplies from his grocer and yet does not in words promise to pay for them. In both cases there is a common ground of negotiation, and this common ground, by the consent of the parties, defines their relations with each other.

In every communication, therefore, there is a real understanding that he who makes the representation is telling the truth, and the act of entering upon such a representation, which is a purely vol-

untary act, involves a real undertaking to tell the truth. This undertaking may or may not contain all the elements of a contract as they are defined by our law, but nevertheless it imports a legal obligation. An intentional breach of it is deceit; an unintentional breach is mistake.

If the foregoing views of deceit and mistake are sound, it follows that the remedy by way of restitution depends upon the possibility of rescission, that is, of undoing the obligation. Now the representation in the case of mistake is mutual, because the mistake is mutual. If, therefore, the defendant alters his position in reliance upon its truth, rescission cannot be had without his consent and the remedy of restitution cannot be applied. This seems to be the true ground for the doctrine of purchase for value as applied by the learned author in his chapter on "Recovery of Money paid upon Mistake."[1] With this explanation, and with such emendations as would be naturally consequent upon it, the principle of restitution is in accord with the conclusions of that chapter.

The cases which have just been discussed have sufficiently indicated the divergence between the conception of justice entertained by the learned author and the conception involved in the principle of restitution. It remains only to show the difference between the identity required by the principle of restitution to exist between the plaintiff's loss and the defendant's gain, and the enrichment required by the doctrine of unjust enrichment. This difference has incidentally been noted in the discussion of the cases of Exall *v.* Partridge,[2] and Deering *v.* Winchelsea.[3] In the former, the plaintiff lost the amount which he paid the landlord, and the defendants profited by their rent, which was paid. The doctrine of enrichment could apply therefore, but the principle of restitution could not, because, since the defendants received nothing from the plaintiff, there was nothing for them to restore. Whatever remedy the plaintiff had was by way of damages, and not by way of restitution. In the latter case there is, for the same reason, no restitution possible. It is somewhat difficult, moreover, to ascertain the measure of enrichment. When one surety pays the whole debt, he loses the full amount. The other surety also profits by the same amount, because he is saved from paying the full amount, and the first inference is that the amount of the debt is the amount

[1] Pages 26–158. [2] 8 T. R. 308; Keener on Quasi-Contracts, 388.
[3] 2 B. & P. 270; Keener on Quasi-Contracts, 401.

of the enrichment. This, however, is absurd, because one surety could then recover the whole debt from another, who could thereupon turn about and on the same principle recover it back. The learned author does not meet this difficulty; but he assumes without argument that the plaintiff can recover only a proportionate share. That measure of recovery can be ascertained, however, only upon the theory that there is already in existence a duty to contribute *pro rata*, and that the enrichment of the defendant is the advantage which he retains upon a refusal. If that duty is made to depend upon the theory of unjust enrichment, there is a complete circle of reasoning, as thus: the defendant is unjustly enriched by his proportionate share of the debt, because he ought to pay it and does not; but he ought to pay it, because if he does not he is unjustly enriched. It follows that, if the plaintiff is to recover at all, it must be upon some other principle than that of unjust enrichment.

One more case will suffice. In Phillips *v.* Homfray,[1] the facts, shorn of some complexity, were these. The plaintiff was the owner of an underground road through a mine, which road, so far as he knew, was unused. It appeared, however, that the defendant had used it for a considerable period of time, and at a considerable saving of expense. When the plaintiff discovered the truth, he brought suit to recover an amount equal to the defendant's savings. There was no evidence that the road suffered any injury by the defendant's unauthorized use. The court denied the recovery; but the learned author regards the case as an illustration of the doctrine of unjust enrichment, and would permit a recovery. The court said in italicized words that the defendant "saved his estate expense, but he did not bring into it any additional property or value belonging to another," or, in other words, denied that the plaintiff suffered any expense. The learned author meets this argument by pointing out, what is perfectly true, that the defendant was enriched by the amount of his savings; but he fails to point out that the plaintiff was at any expense, and that is the very difficulty of the case that the court felt. The point is unanswerable. The plaintiff was not deprived of the use of the property himself, because he made no attempt to use it. He supposed all along that it was unused, and there was nothing to show that, if he had tried to use it, the defendant would have prevented him. He was not deprived of any rentals which a third party might

[1] 24 Ch. Div. 439.

have paid him for the use of it, since he made no effort to rent it. There is only one other supposition possible, to wit, that the plaintiff was deprived of rents which the defendant ought to have paid him. Such a duty on the part of the defendant cannot be explained by the principle of unjust enrichment without a vicious circle, as thus: the defendant is unjustly enriched by the amount of rents which he ought to pay and does not; but he ought to pay those rents, because, if he does not, he is unjustly enriched.

In Phillips *v.* Homfray a recovery was denied; but there are cases where the defendant, by a wrongful use of the plaintiff's property, has benefited himself without causing any loss to the plaintiff, and is nevertheless held in the cases to a liability for all the profits which he has made.[1] To allow a recovery in these circumstances is difficult to justify. It certainly cannot come within any notion of remedy as remedy, because, *ex hypothesi*, the plaintiff has suffered no damage, and there is no damage to repair. Neither is there anything for the defendant to restore. For this reason also the plaintiff cannot bring himself within the principle of enrichment. A recovery therefore, if allowed, reduces itself to a mere punishment, on the theory that no one shall take an advantage by his own wrong. It is a measure of punitive, not remedial, justice, and can be upheld only on the principle that underlies the treble or punitive damages sometimes awarded on a breach of contract. Whether punishment for a wrong should ever take the form of permitting a recovery by a private individual in excess of his own loss is certainly, as a matter of justice, a very debatable question.

There might be many more discussions of the author's cases; but I have given enough to indicate both my agreements and my differences with his doctrine. The whole matter may be summed up in a few words. When the plaintiff can establish that his loss is the defendant's gain, and that the defendant is guilty of a breach of a consensual obligation, or of a tort, he can by action compel restitution in value. So far as this principle agrees with the learned author's results, those results seem to me to be sound; but that beyond these limits there is any principle of unjust enrichment seems to me to be at least questionable.

Everett V. Abbot.

NEW YORK, 1897.

[1] See cases cited and discussed by the learned author at pages 165 *et seq.* of his treatise.